



U.S. Department of Justice

FILED

U.S. ATTORNEY'S OFFICE

Michael J. Sullivan

United States Attorney

District of Massachusetts

UNITED STATES DISTRICT COURT  
DISTRICT OF MASS.

Main Reception: (617) 748-3100

John Joseph Moakley United States Courthouse  
1 Courthouse Way  
Suite 9200  
Boston, Massachusetts 02210

December 11, 2003

J. William Codinha, P.C.  
Melissa Bayer Tearney  
Nixon Peabody LLP  
101 Federal Street  
Boston, MA 002110-1832

04 CR 10003 MEL

Re: United States v. Metalor

Dear Counsel:

This letter sets forth the agreement entered into between the United States Attorney for the District of Massachusetts, "the U.S. Attorney" and your client, Metalor USA Refining Corporation (the "Defendant" or "Metalor"), in the above-captioned matter. The agreement is as follows:

1. Change of Plea

On or before November 15, 2003, or at such date as the Court may determine, Defendant shall waive Indictment and plead guilty to an Information to be filed in the District of Massachusetts in substantially the form attached, charging Defendant with Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity in violation of Title 18, United States Code, Section 1957. Defendant is aware that the Information may be duplicitous and has no objection to the allegation of multiple transactions in a single count, and further, no objection to the forfeiture of property involved in multiple transactions as part of the sentence for that single count.

2. Penalties

Defendant understands and agrees that the statutory maximum penalties for the count to which Defendant is pleading guilty are

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as follows: a fine in the amount of twice the amount of the criminally derived property involved in the transactions, in this case \$9,000,000, pursuant to 18 U.S.C. § 1957(b)(2); five years probation; restitution; and a \$100 special assessment.

### 3. Sentencing Guidelines

The U.S. Attorney and Defendant agree and understand that because the crime charged in the Information occurred after November 1, 1991, the United States Sentencing Guidelines ("U.S.S.G.") relating to the sentencing of organizations (Chapter Eight of the United States Sentencing Guidelines) shall apply. The parties agree that the 1999 U.S. Sentencing Commission Guidelines Manual applies. The parties further stipulate to the factual predicates set forth below and agree that the following is the proper application of the sentencing guidelines to the Information:

#### §8C2.4/§2S1.2(c)(1)(B) Base Fine

*In the case of violations of 18 U.S.C. § 1957, the amount of the organizational fine is the greater of \$150,000 or 50 percent of the value of the funds* ..... \$2,250,000

#### §8C2.5 Culpability Score

(a) *start with 5 points and apply subsections (b) through (g) below* ..... 5

##### (b) Involvement in or Tolerance of Criminal Activity

*(4) the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense* ..... 2

##### (g) Self-Reporting, Cooperation, and Acceptance of Responsibility

*(2) the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct* ..... -2

Total

5

#### §8C2.6 Minimum and Maximum Multipliers

Culpability Score	Minimum Multiplier	Maximum Multiplier
5	1.0	2.0

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§8C2.7 Guideline Fine Range - Organizations

(a) minimum of the guideline fine range (\$2,250,000 x 1.0) .....	\$2,250,000
(b) maximum of the guideline fine range (\$2,250,000 x 2.0) .....	\$4,500,000

§8C2.9 Disgorgement

*The court shall add to the fine determined under §8C2.8 (Determining the Fine Within the Range) any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures ..... \$423,000*

Defendant is aware that it may have the right to challenge its sentence and guilty plea on direct appeal. In consideration of the concessions made by the U.S. Attorney in this Agreement, Defendant knowingly and voluntarily waives its right to appeal:

- (1) Defendant's guilty plea and any other aspect of Defendant's conviction; and
- (2) The imposition by the District Court of the sentence agreed to by the parties, as set out in paragraph 5 and, even if the Court rejects one or more positions advocated by the parties with regard to the application of the U.S. Sentencing Guidelines.

Defendant's waiver of rights to appeal and to bring collateral challenges shall not apply to appeals or challenges based on new legal principles in First Circuit or Supreme Court cases decided after the date of this Agreement which are held by the First Circuit or Supreme Court to have retroactive effect.

This Agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b), and the U.S. Attorney therefore retains his appeal rights.

4. Corporate Authorization

Defendant Metalor will provide to the U.S. Attorney and to the Court written evidence, in the form of notarized resolutions of Metalor's Board of Directors, certifying that Defendant is authorized to waive its right to indictment, to plead guilty to the Information in this case, and to enter into and comply with all provisions of this agreement. The resolution shall further certify that the corporation and its designee are authorized to take these actions and that all corporate formalities, including, but not limited to, approval by Defendant's directors, required for such authorization have been observed.

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Defendant Metalor agrees that J. William Codinha, P.C., as attorney for Defendant and pursuant to duly authorized power of attorney for Defendant, will be authorized to appear on its behalf, enter its guilty plea and represent it for imposition of sentence.

5. Agreed Sentence

The U.S. Attorney and Defendant agree pursuant to Fed. R. Crim. P. 11(c)(1)(C) that the following is the appropriate disposition of this case:

- a. \$2,673,000 fine (comprised of a \$2,250,000 fine determined within the guideline sentencing range, pursuant to §8C2.8, plus \$423,000 disgorgement, pursuant to §8C2.9) to be paid as specified below in paragraph (d);
- b. a five year term of probation, subject to the following special conditions:
  1. Metalor shall institute and follow a compliance program as described in paragraph 8 of this agreement; and
  2. Metalor shall comply with all applicable laws and regulations and shall cooperate fully with all local, state and federal officials, including compliance with any and all reasonable and lawful requests for inspection, verification and monitoring of its compliance program;
- c. \$100 special assessment.
- d. Upon imposition of the sentence, the parties agree that all fines and special assessments, totaling \$2,673,100, be payable forthwith. Defendant agrees to convey the entire amount of the fines and special assessment imposed, by wire transfer to the Clerk of the United States District Court for the District of Massachusetts. Defendant agrees to make this payment within two business days following the imposition of the sentence.

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6. Conditions Precedent

The participation of the U.S. Attorney in the agreement set forth in paragraph 5 of this agreement is conditional upon Defendant's performance of the following obligations:

- a. Defendant shall provide full and truthful cooperation to the United States as set forth in paragraph 9 of this agreement;
- b. No later than two business days prior to sentencing, as scheduled by the Court, Defendant shall notify the United States that Defendant's counsel, Nixon, Peabody LLP is in possession of \$2,673,100 in its client funds account with which to pay Defendant's fine and mandatory special assessment as provided in paragraph 5; and
- c. Defendant shall comply with the remedial measures set forth in paragraph 8 of this agreement.

If Defendant fails to comply with these conditions prior to sentencing, the U.S. Attorney shall be free to recommend any sentence, including fine, he deems appropriate.

7. Mandatory Special Assessment

Defendant agrees to pay the mandatory special assessment, totaling \$100, to the Clerk of the Court of the United States District Court for the District of Massachusetts within two business days after the date of sentencing, unless affirmatively relieved of this obligation by the District Court.

8. Remedial Measures

As a condition of Metalor's probation, Metalor agrees to establish and maintain an effective compliance program (the "Compliance Program") regarding the operation of its business and the identity of its clients in order to ensure that Metalor is dealing with legitimate clients and funds. Metalor further agrees and understands that Immigration and Customs Enforcement (ICE) has the right, at any time, to obtain records and question Metalor employees to monitor compliance. Metalor further agrees that the Compliance Program will be submitted to the United States no later than sixty days after the date of entering into

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this plea agreement, but in any event, prior to the time of sentencing.

Metalor understands and agrees to assume all costs associated with the implementation, maintenance and Court oversight of this condition of probation.

As part of establishing and maintaining an effective compliance program and in order to meet the goal of eradicating customs fraud and Metalor's participation in financial transactions involving the proceeds of unlawful activity, Metalor will do the following:

- a. Designate a compliance officer: Metalor will designate a Compliance Officer and Compliance Committee to implement, oversee, and coordinate the Compliance Program. The Compliance Officer will be provided with the authority to implement the Compliance Program and to use Metalor resources and personnel to achieve that end. Metalor will retain an outside accounting/auditing firm or law firm to review and audit the work of the Compliance Officer in implementing the Compliance Program on a quarterly basis and submit a quarterly report to an ICE designee, as designated by ICE. This outside auditor or law firm is subject to the approval of ICE, at the discretion of ICE.
- b. Implement customer acceptance and verification of customer information: Metalor will take reasonable measures to establish the identity of its customers and will endeavor to accept only those customers whose source of material or funds is legitimate. All new customers must be approved by the Compliance Committee before Metalor engages in any business with that customer.
- c. Implement suspicious activities monitoring and reporting: Unusual or suspicious activities will be monitored through customer contact, third party information, monitoring of transactions, internal monitoring of customer accounts, and other appropriate actions. All Metalor employees will have an affirmative duty to report and any all suspicious activities to the Compliance Officer.

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- d. Implement employee training: Metalor will establish a training program on its Compliance Program for all appropriate employees. Annual training will include how to identify and follow-up on suspicious activities. In addition, employees will be informed about any major changes in applicable law.
- e. Internal Controls: Metalor will implement internal policies, procedures, and controls to ensure application of the Compliance Program.

Metalor acknowledges that any material and substantial failure to implement and to maintain in effect the aforementioned compliance program for the full term of the probationary period shall constitute a breach of this agreement.

#### 9. Cooperation with Law Enforcement

Defendant agrees to cooperate truthfully and completely with the United States in its investigation of possible violations of federal and state law and in any trial or other proceedings arising out of this investigation of Defendant and any of its present and former officers and employees.

a. Defendant understands and agrees that its cooperation obligations will require Defendant to do the following:

- i) require that Defendant's directors, officers and employees disclose to law enforcement any and all information they have of criminal violations including money laundering, transactions involving the proceeds of crime and related offenses and any other financial crimes, as well as any import or export violations or other violations of U.S. Custom's regulations or requirements by Defendant or any other corporation or individual;
- ii) provide technical expertise and assistance to law enforcement as may be requested in ongoing investigations, including but not limited to providing references as needed and purchasing gold from and selling gold to law enforcement at prevailing market rates;

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- iii) require that Defendant's directors, officers and employees disclose to law enforcement any prospective or ongoing criminal activity of which they become aware involving either Defendant's directors, officers and employees or their customers or prospective customers;
- iv) provide access to copies of original documents and records;
- v) require that, upon request and reasonable notice by the U.S. Attorneys, Defendant's directors, officers and employees make themselves available for interviews by law enforcement agents and for attendance at legal and judicial proceedings, including grand jury sessions, trials and other court hearings;
- vi) waive any claim of attorney-client privilege or work product protection with respect to the information disclosed to or obtained by Defendant's Counsel during the period from October 9, 2002 through October 2003, relating to the subject matters of the Information referred to in paragraph 1 of this agreement.
- vii) take all reasonable measures to ensure that Defendant's directors, officers and employees cooperate fully and truthfully with the United States and disclose all information with respect to their activities and those of others relating to violations of federal or state criminal laws.

b. Defendant further understands and agrees that its cooperation obligations will require the following with respect to work product prepared by Metalor's outside counsel which pertains to the U.S. Attorney's and U.S. Customs' investigation of Metalor:

- i) provide all notes and memoranda of interviews compiled and prepared by its counsel of interviews of Defendant's directors, officers and employees;

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- ii) provide all notes and memoranda of interviews compiled and prepared by its counsel of interviews with individuals who are not directors, officers or employees of Defendant;
- iii) Defendant's counsel shall not be required by this agreement to give testimony regarding the subject matters described in paragraphs 9(b)(i) and (ii) above, except pursuant to a trial or grand jury subpoena or other court order.

As limited to such materials, Defendant and its counsel will provide a complete and full waiver of the attorney-client privilege and the work-product privilege, except as to those portions of materials containing the mental impressions and opinions of counsel. Defendant agrees that only portions of materials containing the mental impressions and opinions of its counsel will be redacted from the materials described in this paragraph. The U.S. Attorney agrees that production of such materials will not be construed as a general waiver of the attorney-client privilege and/or work product privilege as to any communications or materials beyond those referred to in paragraphs 9(b)(i) and (ii) above. Defendant also agrees that its outside counsel will provide an index of materials in outside counsel's files pertaining to their internal investigation of Metalor's involvement in customs violations and their participation in financial transactions involving the proceeds of unlawful activity.

c. If Defendant complies with all the terms of this agreement, the United States will, upon request of Defendant, advise the Court and any federal, state or local government agency, including licensing agencies or authorities, of the nature and extent of any cooperation provided by Defendant.

d. In return for Defendant's full and truthful cooperation, the U.S. Attorney agrees not to use any information provided by Defendant pursuant to this agreement (or any information directly or indirectly derived therefrom) against Defendant in any criminal case except: in a prosecution for perjury or obstruction of justice; in a prosecution for making a false statement after the date of this agreement; in a prosecution or other proceeding relating to any crime of violence; in a prosecution or other proceeding relating to a violation of any provision of Title 26 of United States Code. The United States reserves the

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right to respond fully and completely to all requests for information by the District Court and U.S. Department of Probation in this matter. All such disclosures, however, shall be made subject to the provisions concerning the use of this information by the District Court and U.S. Department of Probation contained in U.S.S.G. §1B1.8(a) and the commentary thereto.

e. If the U.S. Attorney determines that Defendant has breached this agreement by knowingly making any false, incomplete or misleading statement, or by knowingly providing any false, incomplete or misleading information, to any law enforcement personnel, grand jury or court, the U.S. Attorney may terminate this agreement as set forth below, and may also prosecute Defendant for any and all offenses that could be charged against Defendant in the District of Massachusetts, including, but not limited to, false statements and perjury.

10. Criminal Liability

Provided that the Defendant complies with the terms of this agreement, the United States Attorney agrees not to seek additional criminal prosecution against Defendant for the conduct described in the Information or any other conduct that has been disclosed to the United States Attorney by Defendant involving its activities in South America that have occurred prior to the date of this agreement.

This agreement is not intended to, and does not, satisfy or affect the criminal liability of any current or former officer, director, employee, agent or representative of the Defendant.

11. Forfeiture

Defendant will forfeit to the United States any and all assets subject to forfeiture pursuant to 18 U.S.C. § 982(a) as a result of Defendant's guilty plea. The assets to be forfeited include, but are not limited to, cash, stocks, bonds, certificates of deposit, tangible and intangible personal property and real estate.

The asset to be forfeited is the following: (a) \$423,000 in United States currency. Defendant admits that this currency is subject to forfeiture on the ground that it constitutes property, real or personal, involved in money laundering offenses in violation of 18 U.S.C. § 1957, or property traceable to such

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property, as charged in Count One of the Information. Defendant therefore consents to the forfeiture of all of Defendant's interest in such forfeitable asset to the United States. The forfeiture may be carried out criminally, civilly, or administratively in the government's discretion.

Prior to sentencing, Defendant agrees to assist law enforcement agents and government attorneys in locating, liquidating, recovering, returning to the United States, and forfeiting all forfeitable assets, wherever located, and in whatever names the assets may be held. Defendant shall promptly take whatever steps are deemed necessary by the U.S. Attorney and/or the Bureau of Immigration and Customs Enforcement to transfer possession of, and clear title to, all forfeitable assets to the United States. Such steps may include, but are not limited to, executing and surrendering all title documents, and signing consent decrees of forfeiture, deeds, sworn statements relating the factual bases for forfeiture, and any other documents deemed necessary by the government to complete the criminal, civil, or administrative forfeiture proceedings which may be brought against the assets identified in this section and against any other forfeitable assets involved in or related to any of the criminal acts charged in the Information.

The forfeitures set forth herein shall not satisfy or offset any fine, restitution, cost of imprisonment, or other penalty imposed upon Defendant, nor shall the forfeitures be used to offset Defendant's tax liability or any other debt owed to the United States.

In addition to all other waivers or releases set forth in this Agreement, Defendant hereby waives any and all claims arising from or relating to the forfeitures set forth in this section, including, without limitation, any claims arising under the Excessive Fines Clause of the Eighth Amendment or the Double Jeopardy Clause of the Fifth Amendment, or to the United States Constitution, or any other provision of state or federal law.

The United States District Court for the District of Massachusetts shall retain jurisdiction to enforce the provisions of this section.

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12. Probation Office Not Bound By Agreement

The sentencing dispositions agreed upon by the parties and their respective calculations under the Sentencing Guidelines are not binding upon the United States Probation Office. Defendant's plea will be tendered pursuant to Fed. R. Crim. P. 11(a)(1)(C). Defendant cannot withdraw its plea of guilty unless the sentencing judge rejects the plea agreement. If the sentencing judge rejects the plea agreement, this agreement shall be null and void at the option of either the United States or the Defendant. In this regard the Defendant hereby waives any defense to any charges which it might otherwise have under any statute of limitations or the Speedy Trial Act.

13. Information For Presentence Report

Defendant agrees to provide all information requested by the U.S. Probation Office concerning its assets, income and financial condition.

14. Civil Liability

By entering into this agreement, the U.S. Attorney does not compromise any civil liability, including but not limited to any tax liability, which Defendant may have incurred or may incur as a result of its conduct and its plea of guilty to the charges specified in paragraph 1 of this agreement.

15. Withdrawal of Plea Agreement

Should Defendant's guilty plea not be accepted by the Court for whatever reason, or later be withdrawn on motion of Defendant, this agreement shall be null and void at the option of the U.S. Attorney.

16. Breach of Agreement

If the U.S. Attorney determines that Defendant has failed materially to comply with any provision of this agreement, or have committed any crime during the pendency of this agreement, the U.S. Attorney may, at his sole option, be released from his commitment under this agreement in its entirety by notifying Defendant, through counsel or otherwise, in writing. The U.S. Attorney may also pursue all remedies available to him under the law, irrespective of whether he elects to be released from his commitments under this agreement. Defendant recognizes that no

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such breach by Defendant of any obligation under this agreement shall give rise to grounds for withdrawal of its guilty plea. Defendant understands that should any such breach of this agreement occur, the U.S. Attorney will have the right to use against Defendant before any grand jury, at any trial, hearing or for sentencing purposes, any statements made by its employees and agents, and any information, materials, documents or objects provided by Defendant to the U.S. Attorney pursuant to this agreement without any limitation. In this regard, Defendant hereby waives any defense to any charges which it might otherwise have under any statute of limitations or the Speedy Trial Act.

17. Who Is Bound By Agreement

This agreement is limited to the United States Attorney for the District of Massachusetts and cannot and does not bind the Attorney General of the United States or any other federal, state or local prosecutive authorities not identified above.

18. Complete Agreement

This agreement is the complete and only agreement between the parties. No promises, agreements or conditions have been entered into other than those set forth in this letter. This agreement supersedes prior understandings, if any, of the parties, whether written or oral. This agreement cannot be modified other than in a written memorandum signed by the parties or on the record in court.

If this letter accurately reflects the agreement entered into between the U.S. Attorney and Defendant, please sign the Acknowledgments of Plea Agreement below, and affix Defendant's corporate seal. Please also have the signatures of the corporate signatories notarized. In addition, please provide a copy of requisite authorization to enter into this agreement, by

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Defendant's directors (the original to be provided to the Court). Please return the original of this letter to Assistant United States Attorney Allison D. Burroughs.

Sincerely,

MICHAEL J. SULLIVAN  
United States Attorney

By:   
JAMES FARMER  
Chief, Criminal Division

STEPHEN P. HEYMANN  
Deputy Chief, Criminal Division

ALLISON D. BURROUGHS  
Assistant U.S. Attorney

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ACKNOWLEDGMENT OF PLEA AGREEMENT

Metalor USA Refining Corporation

I have read this letter of agreement in its entirety, and have discussed it with the directors of Metalor USA Refining Corporation and with its attorneys. I hereby represent that I am an officer of Defendant corporation and that I am duly authorized to enter into this agreement. I hereby acknowledge that this letter of agreement fully sets forth the agreement of Metalor USA Refining Corporation with the United States Attorney for the District of Massachusetts. I further state that there have been no additional promises or representations made to or for the benefit of Metalor USA Refining Corporation by any officials of the United States in connection with this matter.

*[Signature]*  
For Defendant:  
METALOR USA REFINING CORPORATION

Date: 12/23/04

Corporate Seal:

Notary Acknowledgment and Seal:

I certify that this plea agreement letter has been reviewed by duly authorized officials of Metalor USA Refining Corporation who understand its terms.

*J. William Codinha, PC*  
J. WILLIAM CODINHA, P.C.

Date: 01/07/04

*Melissa Bayer Tearney*  
MELISSA BAYER TEARNEY, ESQUIRE  
Attorneys for Metalor USA Refining Corporation

Date: 01/07/04

Légalisation : Vu par moi, notaire, pour légalisation de la signature apposée ci-contre  
par :

- Monsieur Roland Markus Held, né le 1<sup>er</sup> juin 1963, originaire de Zollikofen/BE, à Biel/Bienne/BE, en qualité de directeur de Metalor USA Refining Corporation ; -----  
Neuchâtel, le vingt-trois décembre deux mille trois (23 décembre 2003) -----

Rép. Gén. 68 N° 155

